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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SEVEN

SHAHRAM FOZOONMEHR,

Plaintiff and Appellant,

v.

RE/MAX P.V. REALTY, et al.,

Defendants and Respondents.

B206257

(Los Angeles County  
Super. Ct. No. YC 051037)

APPEAL from an order of the Superior Court of Los Angeles County.

Andrew C. Kauffman, Judge. Reversed.

Levy, McMahon & Levin and Bruce K. McMahon for Plaintiff and  
Appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, James A. Stankowski, Marc  
V. Allaria and Robert Cooper for Defendant and Respondent Re/Max P.V. Realty.

Wilson, Elser, Moskowitz, Edelman & Dicker, James A. Stankowski, Marc  
V. Allaria and Robert Cooper; Lewis Brisbois Bisgaard & Smith, Roy Weatherup and  
Michael B. Wilk for Defendant and Respondent George Wong.

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Plaintiff Shahram Fozoonmehr appeals from the order of dismissal in favor of defendants Re/Max P.V. Realty (ReMax) and George Wong after the court sustained their demurrer to a fraud cause of action without leave to amend. Plaintiff contends the court improperly sustained the demurrer as he pled he relied on implied misrepresentations made by defendants relating to plaintiff's purchase of property, i.e., plaintiff alleged defendants concealed certain reports of adverse soils conditions on the property that they had a duty to disclose. We reverse.

### **FACTUAL AND PROCEDURAL SYNOPSIS**

In 2003, appellant purchased a vacant property (the Property) in Rolling Hills estates from Donald Jin and Janet Jin for \$900,000. The Jins were represented by ReMax and Wong.

The land purchase agreement required the sellers (the Jins) to disclose any soil fill on the Property or any other soil problems, including slippage or sliding. The buyer (appellant) had 60 days to conduct any investigation regarding the Property's geological conditions. The buyer then had the right to cancel the sale based on any information discovered.

Appellant filed the original complaint on June 1, 2005, against other parties.

#### **I. Second Amended Complaint (SAC) Allegations**

Pursuant to the term of the sales contract with the Jins, the closing of escrow was conditioned on appellant's receipt of a favorable soils report from a licensed geotechnical engineer. On January 30, 2003, appellant entered into a contract with Hu Associates, Inc. (Hu), a licensed geotechnical engineering consultant, to examine the conditions of the Property. Appellant advised Hu that he intended to purchase the Property only upon assurance from Hu that the geotechnical conditions were suitable for construction of a

residence and the engineering costs to stabilize the soils around the residence would not be cost prohibitive.

Hu subsequently informed appellant that a licensed geologist should be retained to conduct a geological investigation in order to assist Hu to provide an accurate assessment of the geological conditions of the Property. Hu hired Environmental Geotechnology Laboratory, Inc. (EGL) to perform the necessary investigation.<sup>1</sup> EGL conducted its field exploration of the Property on February 17, nearly two months before the close of escrow.

On April 7, Hu reported to appellant the results of the geological investigations. Hu informed appellant in a written report that, notwithstanding the existence of unstable soils on certain portions of the Property, the soils conditions at the site where appellant intended to construct his residence were suitable for such construction. Based on Hu's report, appellant closed escrow three days later on April 10, 2003.

At appellant's request, Hu prepared a formal report regarding the actual soils conditions of the Property to be submitted to the City of Rolling Hills and the County of Los Angeles (County) along with architectural and engineering plans for approval. In February 2004, appellant received a written report from Hu reaffirming Hu's prior conclusions and affirming the soils conditions were suitable for the intended construction with minimal costs for soils stabilization.

After submitting architectural plans to the County in March 2004, appellant received the County's response two months later informing him that an ancient landslide noted in the public records covered a substantial portion of the Property beyond what was reflected in appellant's reports and maps. The County requested additional information from appellant regarding the actual extent of the landslide as a precondition for approving his plans for construction. Appellant again retained Hu to respond to the County's concerns. Hu's February 2005 report concluded that the areas of unstable soil covered

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<sup>1</sup> Hu and EGL were named defendants in other causes of action.

far greater areas of the Property than reflected in his February 2004 report and that the ancient landslide existed over most of the entire lot, including the area where appellant intended to construct the residence.

Appellant alleged that he “reasonably relied on the recommendations and opinions in [Hu’s] written reports in deciding whether or not to purchase the subject real property” and that “[b]y simply referring to available maps and diagrams within the documentation existing at the [County] Department of Building and Safety [Hu] would have discovered the actual soils conditions existing at the subject property.”

For the first time, the SAC identified respondents as defendants. The SAC alleged four causes of action against respondents: fraud, breach of duty to disclose, breach of duty to be honest and truthful, and negligent misrepresentation.<sup>2</sup> The fraud cause of action alleged respondents knew about a written soils report dated December 23, 1980, addressing the existence of an ancient landslide underlying the entire property which they failed to disclose, they failed to disclose the existence of the report with the intent to induce appellant to complete the purchase of the Property, as of result of the failure to disclose, appellant completed the purchase of the Property, and appellant first learned about the report on April 18, 2007, when Wong produced it at his deposition.

Appellant sought to recover compensatory and punitive damages from respondents based on the additional costs required to build his custom house as a result of the adverse property conditions.

Respondents demurred to the SAC on the basis that given appellant’s allegation he had relied on Hu’s report in purchasing the Property, appellant could not demonstrate he relied on respondents’ acts or omissions in order to purchase the Property. The court sustained the demurrer to the fraud cause of action with leave to amend.

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On appeal, appellant pursues only the fraud cause of action.

## **II. The Third Amended Complaint (TAC) Allegations**

Respondents and the Jins made no affirmative representations -- written, verbal or otherwise -- to appellant at any time regarding the soils conditions of the Property.

Appellant alleged that he had “completed the purchase of the property” based on respondents’ actions and that respondents had concealed two prior soils reports disclosing adverse soils conditions and that he had been damaged by having to hire his own experts to investigate the Property’s soil conditions and by incurring repair costs to stabilize the Property.

Appellant further alleged that even with reasonable diligence, he could not have discovered the alleged concealment of the prior soils reports prior to Wong’s deposition. Appellant alleged he had been damaged in a sum equal to the amount required to repair the defects, or by the loss of value of the Property, and by the \$43,705 he paid Hu for Hu’s professional services that appellant would not have otherwise incurred.

Respondents demurred to the TAC on the basis appellant had failed to address the defects raised in their prior demurrer, arguing appellant failed to demonstrate the reliance element of his fraud claim. Respondents also asserted the action was barred by the statute of limitations. The court sustained the demurrer without leave on the ground appellant had not demonstrated he justifiably relied on respondents’ actions or omissions in purchasing the Property.

The court signed an order dismissing the TAC against respondents. Appellant filed a timely notice of appeal from that order.

### **DISCUSSION**

“Generally, [t]he elements of fraud, which give [] rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or scienter); (c) intent to defraud, i.e., to induce reliance; (d)

justifiable reliance; and (e) resulting damage.” (Citations & internal quotation marks omitted.) (*McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 792.)

“In reviewing the pleadings, we are not bound by the determination of the trial court, but are required to render our independent judgment on whether a cause of action has been stated.” (*Hoffman v. State Farm & Casualty Co.* (1993) 16 Cal.App.4th 184, 189.) “Our only task in reviewing a ruling on a demurrer is to determine whether the complaint states a cause of action. Accordingly, we assume that the complaint’s properly pleaded material allegations are true and give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context. We do not, however, assume the truth of contentions, deductions, or conclusions of fact or law.” (Citations omitted.) (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)

In the case at bar, the court sustained respondents’ demurrer on the grounds that appellant had not pled justifiable reliance. Appellant contends that he established the reliance element as he pled he would have acted differently had respondents disclosed the reports showing the Property’s geologic instability rendered it unbuildable and, had he known the Property was unbuildable, he would never have entered into the transaction.

“Reliance exists when the misrepresentation or nondisclosure was an immediate cause of the plaintiff’s conduct which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she would not, in all reasonable probability, have entered into the contract or other transaction. ‘Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff’s reliance is reasonable is a question of fact.’ ‘However, whether a party’s reliance was justified may be decided as a matter of law if reasonable minds can come to only one conclusion based on the facts.’” (Citations omitted.) (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239.)

According to the TAC, the alleged implied misrepresentation was that respondents and the Jins “were unaware of any adverse conditions affecting the property.” “To recover for fraud in any case the plaintiff must show that he reasonably relied on the

defendant's misrepresentations. The plaintiff cannot recover if his reliance was not justified or reasonable.” (*Phillippe v. Shapell Industries* (1987) 43 Cal.3d 1247, 1270.)

The plaintiff must also plead he actually relied on the misrepresentation even if based on an omission. (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1091-1093.) In determining actual reliance was an element of a cause of action for deceit based on an omission, the court reasoned, “it is not logically impossible to prove reliance on an omission. One need only prove that, had the omitted information been disclosed, one would have been aware of it and behaved differently.” (*Id.*, at p. 1093; see also *Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 678 [““It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision.””].)

“Claims for fraud by omission are also subject to the requirement of actual reliance, and thus fall within the scope of section 548 of the Restatement Second of Torts. Because these claims do not involve affirmative misrepresentations, we conclude that actual reliance for the purpose of fraud by omission occurs only when the plaintiff reposes confidence in the material completeness of the defendant's representations, and acts upon this confidence.” (Italics omitted.) (*Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, 808.)

Respondents contend appellant cannot establish he relied on any misrepresentation they made because he alleged he relied on Hu's report in deciding to purchase the Property. ““The mere circumstance that one makes an independent investigation or consults with others does not necessarily show that he relied on his own judgment rather than upon the representations of the other party, nor does it give rise to a presumption of law to that effect.’ . . . ‘Where one conducts an investigation, he may still be entitled to rely upon certain representations concerning conditions as to which the investigation does not extend.’” (Citations omitted.) (*Gormly v. Dickinson* (1960) 178 Cal.App.2d 92, 104-105.)

Appellant argues his reliance on Hu's report does not relieve respondents of liability because Hu reported only that part of the Property had unstable soil (and that the portion on which appellant wished to build was stable) whereas in fact the entire Property was unsuitable for building a residence. Thus, appellant argues the investigation did not reveal the true facts about the Property. (See *Mercer v. Elliott* (1962) 208 Cal.App.2d 275, 279 ["It is only where a party to whom a representation is made has the means at hand for determining its truth or falsehood and resorts to such means, without interference by the other party, and after investigation learns that the statement was false, that he is precluded from asserting that he relied upon the representation. The rationale for this is that the investigation and ascertainment of the facts exclude the idea that any reliance was placed upon the falsehood."].)

The TAC alleged that appellant had "completed the purchase of the property" based on respondents' actions and that respondents had concealed two prior soils reports disclosing adverse soils conditions and that he had been damaged by having to hire his own experts to investigate the property's soil conditions and by incurring repair costs to stabilize the property. The first report was described as an engineer's written soils report dated December 23, 1980, which included the engineer's conclusion the Property "was underlain by an ancient landslide covering a substantial portion of the property." The other report was from a geologist dated November 6, 2001, which "concluded, among other things, that the property would necessarily have to be explored with deep borings in order to satisfy the County Department of Public Works that the property was suitable for building a single family residence."

The TAC alleged that appellant advised Hu that he intended to purchase the Property only upon assurance from Hu that the geotechnical conditions were suitable for construction of a residence and the engineering costs to stabilize the soils around the residence would not be cost prohibitive and that appellant "reasonably relied on the recommendations and opinions in [Hu's] written reports in deciding whether or not to



purchase the subject real property.” However, those allegations did not relieve respondents of their duty to disclose any soil problems on the Property.

We cannot conclude as a matter of law that appellant could not reasonably or justifiably rely on the implied representation that respondents were unaware of any adverse condition on the Property. Whether appellant relied on or continued to rely on respondents and whether that reliance was justified are questions of fact.

Respondents suggest the demurrer could have been sustained on the alternate grounds of the applicable statute of limitations. (See *Carman v. Alvord* (1982) 31 Cal.3d 318, 324.) Respondents argue that the statute of limitations began to run in 2003 because appellant had actual notice of the property conditions giving rise to this action from Hu’s report or from the public records showing the existence of the landslide.

However, appellant alleged he discovered the reports in April 2007 when Wong produced them at his deposition. (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807 [The discovery rule postpones accrual of a cause of action until the plaintiff discovers, or had reason to discover, the cause of action].) Appellant added respondents as defendants in May 2007, well within the applicable statute of limitations. Because Hu’s 2003 report indicated that only a portion of the Property was unstable (and that the portion appellant wanted to build on was suitable for construction), it did not put appellant on inquiry notice respondents had misrepresented the Property had no adverse conditions. Even if Hu had discovered the soil conditions under all of the Property were unstable, that finding would not have put appellant on inquiry notice that someone knew of that condition but kept it hidden from appellant. (*Id.*, at pp. 814-815.) Similarly, public records of the landslide would not have given appellant notice that respondents had deceived him because they had a report indicating the existence of the landslide.

Accordingly, we reverse the order of dismissal as we conclude the court improperly sustained the demurrer and direct the court vacate its order sustaining the demurrer and enter a new order overruling the demurrer.

## **DISPOSITION**

The order of dismissal is reversed with directions to the superior court to vacate its order sustaining respondents' demurrer and enter a new order overruling the demurrer. Appellant to recover costs on appeal.

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**WOODS, J.**

**We concur:**

**PERLUSS, P.J.**

**ZELON, J.**